

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**WILLIAM G. WERT,

Respondent.**

**Docket No. FMCSA-2007-27769¹
(Eastern Service Center)**

ORDER ON RECONSIDERATION

1. Background

On January 24, 2007, the New York Division Administrator for the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) to Respondent, William G. Wert, proposing a civil penalty of \$450, for three alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Specifically, the Notice of Claim, which was based on an October 24, 2006, compliance review (CR) conducted at McFarren & Sons Trucking LLC, charged Respondent with three violations of 49 CFR 390.35/391.45 for fraudulently or intentionally making a false entry on a required medical examiner's certificate.² An attached "Service List" certified that the NOC was mailed to Respondent on January 24, 2007, by Certified Mail, Return Receipt Requested.³

On March 1, 2007, Claimant, the FMCSA Eastern Service Center Field Administrator, issued a Notice of Default and Final Agency Order (NDFAO) due to

¹ The prior case number of this matter was NY-2007-0125-US0695.

² See Exhibit 1 to "Field Administrator's Opposition to Petition for Reconsideration" (Claimant's Opposition).

³ *Id.*

Respondent's failure to reply to the Notice of Claim within 30 days of its service, as required by 49 CFR 386.14(c). According to the NDFAO, the NOC was served on Respondent on January 24, 2007. Pursuant to 49 CFR 386.14(c), the NOC became the Final Agency Order, effective March 6, 2007.

On March 14, 2007, Respondent sent a letter to Claimant, averring that: (1) due to his hospitalization from January 21, 2007, to February 28, 2007, he did not receive the NOC allegedly served on January 24, 2007; and (2) he could not pay the civil penalty because his illness has rendered him unable to work.⁴ Although Respondent did not specifically petition for the FMCSA Assistant Administrator (AA) to reconsider the Final Agency Order, as prescribed by 49 CFR 386.64,⁵ his letter to Claimant essentially raised the same issue that would have been raised in a "Petition for Reconsideration." For this reason, his letter to Claimant is considered to be a Petition for Reconsideration.

On March 29, 2007, Claimant opposed the Petition for Reconsideration. Claimant argued that Respondent did not successfully demonstrate excusable neglect, meritorious defense, or due diligence in seeking relief, because Respondent did not provide documentation to prove his hospitalization during the relevant period.⁶

2. Decision

Claimant correctly stated that, under the revised Rules of Practice, the only issue on reconsideration is whether the respondent, *after being found in default*, demonstrated

⁴ See Exhibit 3 to Claimant's Opposition.

⁵ 49 CFR 386.64(a) states that within 20 days following service of the Final Agency Order, any party may petition the *Assistant Administrator* for reconsideration of the order (emphasis supplied).

⁶ See Claimant's Opposition, at 2.

excusable neglect, a meritorious defense, or due diligence in seeking relief⁷ In applying this rule, Claimant maintained that Respondent defaulted on the NOC when he did not reply to the NOC after 30 days of its service; and after the default, Respondent failed to demonstrate excusable neglect when he provided no documentation to support his claim of hospitalization.⁸

Claimant's application of the rule is misplaced. In order to proceed to the determination of excusable neglect, meritorious defense, or due diligence in seeking relief, Claimant must first show that Respondent has defaulted. Pursuant to 49 CFR 386.14(a), Respondent must reply to a NOC within 30 days of its service (emphasis added). Section 386.14(c) provides that the respondent's failure to answer the NOC in accordance with section 386.14(a) may constitute a default. Claimant did not meet his burden of proof because he could not demonstrate that the NOC was served on Respondent, which is the only event that would trigger the 30-day clock counting down to a finding of default. Service of the NOC by Certified Mail may be established either by the acceptance signature of Respondent on the Return Receipt, or in accordance with 49 CFR 386.6. Under 49 CFR 386.6(e), as currently written, a properly addressed document, sent by U.S. Mail, which was returned, unclaimed, or refused, is deemed to have been validly served.⁹ In this instance case, Claimant averred that the NOC was served on Respondent on January 24, 2007, by U.S. Certified Mail, Return Receipt Requested. To support his contention, Claimant provided a copy of a "U.S. Postal Service Certified Mail Receipt" (PS Form 3800) and a copy of a "Document Return

⁷ See *Id.*, at 2 (emphasis added).

⁸ *Id.*

⁹ See 49 CFR 386.6.

Receipt” (PS Form 3811), commonly referred to as a “green card.” Both documents bore Respondent’s name and address labels, presumably printed by Claimant. However, the Certified Mail Receipt did not show a postmark identifying the date of receipt by the Postal Services; and the Return Receipt did not show a postmark for the date of attempted delivery. The Return Receipt also lacked Respondent’s signature (which would have indicated an acceptance by Respondent), or indications showing that the mail was returned, unclaimed, or rejected. In fact, the copy of the Return Receipt exhibited clear dotted lines on both left and right edges over the background, from which I infer that when the copy was made, the Return Receipt was still attached to the original outgoing mail.

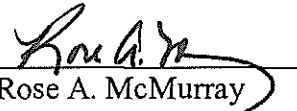
I have previously held that even if Claimant has met the requirements of section 386.6(e) by demonstrating that the NOC was returned or rejected, he must do more in his attempt to inform Respondent that there was a monetary claim against him for alleged violations of the FMCSRs.¹⁰ Claimant’s inaction following the return of the certified letter does not satisfy the due process requirements.¹¹ In the instant case, Claimant’s evidence does not even show that the service of the NOC met the requirements of section 386.6(e) by demonstrating that the letter was accepted, returned, unclaimed, or rejected. Thus, Claimant did not meet his burden of proof in establishing that the NOC was properly served on Respondent as required by the FMCSA regulations and the due process requirements. Without a showing of valid service, Claimant may not make the

¹⁰ See *In the Matter of Maverick Aviation Consultants, Inc.*, Docket No. FMCSA02007-27935, Order Vacating Notice of Default and Final Agency Order and Appointing Hearing Officer, February 4, 2008, at 5; *In the Matter of C&R Express, Inc.*, Docket No. FMCSA-2007-0106, Order Denying Entry of Default Judgment, Denying Motion for Final Order, and Dismissing Proceeding, April 4, 2008, at 3.

¹¹ *Id.*

determination that Respondent was in default.

ACCORDINGLY, *It Is Thereby Ordered That* the Final Agency Order is vacated without prejudice. Claimant may reissue the Notice of Claim.¹²


Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5-5-09
Date

¹² This docket is closed. Should the matter come again before the Assistant Administrator, a new docket number will be opened.

CERTIFICATE OF SERVICE

This is to certify that on this 6 day of May, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

William G. Wert
11 Fourth Avenue
Warrensburgh, NY 12885

One Copy
U.S. Mail

Anthony G. Lardieri,
Trial Attorney
Federal Motor Carrier Safety Administration
Eastern Service Center
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
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Robert W. Miller, Field Administrator
Federal Motor Carrier Safety Administration
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Brian K. Temperine, Division Administrator
Federal Motor Carrier Safety Administration
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Leo O'Brian Federal Bldg, Room 719
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